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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN PHILLIP RUTHERFORD,)	Civil No. 07cv47 L (AJB)
)	
Plaintiff,)	
v.)	ORDER DENYING PLAINTIFF'S
)	MOTION TO COMPEL AND
UNITED STATES OF AMERICA,)	ORDERING DELIVERY OF
)	REDACTED PAPERS
Defendants.)	
_____)	[Doc. No. 37]

On July 24, 2008, Plaintiff Phillip Rutherford ("Plaintiff") filed a motion to compel an appraisal report and related materials (together, the "appraisal"). On August 4, 2008, Defendant United States of America ("Defendant") filed a response in opposition to Plaintiff's motion. On August 7, 2008, Plaintiff filed a reply. The Court has taken the motion under submission on the papers pursuant to Local Rule 7.1(d)(1) and has carefully considered the papers and all accompanying materials.

BACKGROUND

This cases arises out of alleged damages suffered by Plaintiff by the Pines Fire. Anderson – Brabant, Inc. was retained by the Drug Enforcement Administration (the "DEA") to perform an appraisal of the diminution in value sustained to Plaintiff's real property. Plaintiff now seeks discovery of the appraisal.

1 Plaintiff claims that Defendant has waived its right to assert any privileges or objections based
2 on the following three incidents: (1) Defendant allegedly voluntarily disclosed information from the
3 appraisal; (2) Defendant allegedly failed to properly respond to a request for production of documents
4 propounded by Plaintiff; and (3) Defendant allegedly failed to properly move to quash a subpoena
5 served by Plaintiff on Anderson – Brabant, Inc. or move for a protective order.

6 With regard to the alleged voluntary disclosure, Plaintiff claims that Defendant disclosed from
7 the appraisal the specific amount of damages allegedly suffered by Plaintiff as a result of the diminution
8 of value to the real property caused by the Pines Fire. Plaintiff believes that this disclosure was a waiver
9 of all relevant privileges. With regard to the alleged failure to properly respond to a request for
10 production of documents, Plaintiff states that Defendant failed to serve timely responses on the deadline
11 of April 9, 2008 or the agreed extensions of April 23, 2008 and June 6, 2008. Plaintiff believes that the
12 failure to timely respond was a waiver to all objections. With regard to the subpoena served on
13 Anderson – Brabant, Inc. requesting the appraisal file, Plaintiff states that Defendant served on Plaintiff
14 and Anderson – Brabant, Inc. a notice of objections but never filed a motion to quash the subpoena or a
15 motion for a protective order. Plaintiff believes that the failure to object in either of these ways is a
16 waiver of all grounds for objection, including privilege.

17 Defendant opposes the motion and claims the appraisal is not discoverable because the appraisal
18 is, (1) attorney work product as the appraisal of a consultant to the DEA; (2) attorney-client material as
19 the DEA sent the consultant's appraisal to its counsel, the US Attorney; (3) protected under Federal
20 Rule of Evidence 408 because it was not disclosed, but only discussed in settlement negotiations; (4)
21 protected by the deliberative process privilege as pre-decisional materials; and (5) protected by the
22 litigation preparation or trial preparation privilege of Federal Rule of Civil Procedure 26(b)(3)(A)(ii)
23 and 26(b)(3)(B).

24 Defendant explains that the appraisal was created by a consultant hired by counsel for the DEA
25 to provide a report for internal DEA use in evaluating Plaintiff's administrative claim. Defendant
26 further states it was used by the counsel for the DEA as a part of the pre-decisional materials leading to
27 the adjudication of Plaintiff's administrative claim and DEA's negotiating position with Plaintiff
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1 regarding a potential settlement. The appraisal was provided to the US Attorney by the DEA and never
2 disclosed to anyone outside of the DEA or the Department of Justice.

3 Defendant states that it has, since the Early Neutral Evaluation, asserted the protected nature of
4 the appraisal and has never withdrawn the claim that it is privileged. With regard to Plaintiff's requests
5 for production of documents, Defendant states it verbally and in writing objected. Defendant explains
6 that on June 27, 2008, it provided Plaintiff with a written response to several requests and on June 28,
7 2008, it provided Plaintiff with a privilege log. It is Defendant's position that although the delivery of
8 the privilege log took longer than anticipated, there was no established schedule for completion of the
9 agreed-upon plan.

10 In response to Plaintiff's claim that Defendant failed to bring a motion to quash or motion for
11 protective order, Defendant states that Rule 45 does not require it to do so. Defendant also disagrees
12 with Plaintiff's quotation of the of the appraisal's valuation in his publicly filed motion. Finally,
13 Defendant claims that Plaintiff's motion is untimely and should be summarily denied.

14 **LEGAL AUTHORITY AND DISCUSSION**

15 The attorney work product doctrine protects documents prepared in anticipation of litigation or
16 for trial by another party or its representative. (Fed. R. Civ. P. 26(b)(3)(A).) This representative can be
17 the attorney, consultant, surety, indemnitor, insurer, or agent. (*Id.*)

18 Through requests for production of documents served on Defendant and a third party subpoena
19 served on Anderson – Brabant, Inc., Plaintiff seeks the appraisal. The appraisal was prepared by the
20 DEA's consultant, Anderson – Brabant, Inc. for the DEA's counsel handling Plaintiff's administrative
21 claim. The appraisal is, therefore, protected attorney work product. The only way the appraisal could
22 be deemed discoverable is if Defendant waived its protection in any way.

23 Plaintiff claims the protection was waived in three ways as discussed above. First, Plaintiff
24 argues that Defendant made the waiver by disclosing the appraiser's conclusion on the value of the
25 damage suffered by Plaintiff. Before discussing the substance of this argument, the Court must
26 reprimand Plaintiff for improperly inserting the exact valuation from the appraisal in its publicly filed
27 motion. This is a substantial part of the information involved in this very discovery dispute and it is
28 improper to attempt to insert the number reached by the appraiser into this case by way of this motion.

1 The magistrate judge's chambers was forced to go through complicated steps in order to remove the
2 papers from the docket as well as retrieve any copies which may have been delivered to the district
3 judge's chambers before the dollar amount was revealed to the trial judge in this case. With regard to
4 Plaintiff's argument, the work product protection of the appraisal was not disturbed by Defendant's
5 disclosure of the valuation reached in the appraisal during settlement negotiations. Federal Rule of
6 Evidence 408 does not allow the use of statements made in settlement negotiations regarding the claims
7 at issue. There is no evidence that the appraisal was otherwise shared with anyone outside of the DEA
8 or Department of Justice. *Atari v Sega of America*, 161 FRD 417 (N.D. CA. 1994) is distinguishable on
9 its facts and not dispositive of the issues I this case.

10 Next, Plaintiff claims that a waiver of all objections was made because of Defendant's failure to
11 respond to requests for production in a timely manner. Although Defendant provided its responses and
12 privilege log months after the original deadline, it appears that the parties were engaged in various
13 stages of the meet and confer process throughout that time period. Even assuming Defendant did miss
14 an extended deadline granted by Plaintiff, the harm of this error does not warrant stripping the ap-
15 praisal's work product protection.

16 Finally, Plaintiff argues that Defendant's failure to file a motion to quash or motion for
17 protective order in response to the subpoena served on Anderson – Brabant, Inc. serves as a waiver of its
18 objection to the production of the appraisal. This Court notes that Defendant promptly responded to the
19 subpoena with a notice of objection. The notice of objection was consistent with all of the actions taken
20 by Defendant with regard to the appraisal. Since the Early Neutral Evaluation, Defendant has character-
21 ized the appraisal as protected work product. The Court is not concerned about the form of Defendant's
22 objections, only that they were made.

23 CONCLUSION AND ORDER

24 Therefore, the Court issues the following orders:

25 1. Plaintiff's motion to compel is **DENIED**;

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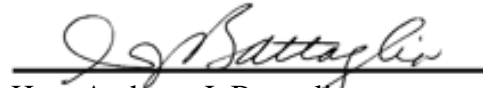
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2. On or before August 27, 2008, Plaintiff will provide the Court copies of the motion, opposition, and reply after having redacted the appraiser's valuation.

IT IS SO ORDERED.

DATED: August 14, 2008


Hon. Anthony J. Battaglia
U.S. Magistrate Judge
United States District Court